

**United
Talmudical Academy
"Torah V'Yirah"**



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דרבינו יואל מסאטמאר

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December 27, 1999

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DEC 29 1999

FCC MAIL ROOM

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. Rm. TW-A325
Washington, D.C. 20554

Re: Appeal to the FCC by the United Talmudical Academy of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 97-21.

Dear Ms. Rosman Salas:

This letter is respectfully submitted in response to the Schools and Libraries Division ("SLD") policy letter now before you, dated December 20, 1999, submitted by D. Scott Barash, Vice President and General Counsel of the Universal Service Administrative Company ("USAC"). The Appeal before the Commission is that of the United Talmudical Academy of Brooklyn, New York, ("UTA") on the denial of its Form 471 application for the 1998 funding year and its subsequent request for a *de novo* review of a portion of that application.

As was clearly outlined in the UTA's memorandum submitted on appeal (dated August 10, 1999, a copy of which is submitted herewith for your convenience and review), the issues presented were not only the unconstitutional application of the SLD's purported policies to the UTA's request for funding but, among other things, the failure to provide a *de novo* review of the UTA's revised application on appeal as mandated by the FCC's regulations and the Telecommunications Act of 1996. In short, once presented with the UTA appeal and request for *de novo* review the SLD was required to assess the application on appeal – as is and without a retrospective to the underlying Form 471 application. This the SLD did not do. Its insistence on a policy of one strike and you're out, clearly contrary to its FCC and Congressional mandate, as well as basic notions of due process and the right to a *de novo* review, is what is now properly before the FCC for full review. The SLD, having failed to adequately prepare and educate applicants in the funding process, has improperly and summarily denied funding to a large community educational institution on the sole basis that once having submitted an application not entirely worthy of funding, the institution can never recover or revise to the extent of securing any funding from the SLD.

Mr. Barash in his letter to you resorts to 'SLD Policy' "adopted by the Schools and Libraries Committee of the USAC Board of Directors," as a complete defense to the SLD's actions. In an intricate labyrinth of refined phraseology Mr. Barash "clarifies" that "in instances where SLD concludes that an applicant cannot provide sufficient documentation to support its necessary resources certification, SLD denies **all** applications, including all the funding requests on each application, submitted by that applicant." Mr. Barash continues his elucidation of SLD policy and asserts that "where SLD determines that a necessary resources certification is inaccurate and/or inadequate, the validity of the entire application is called into question." He argues that the Policy calls the entire application into question solely as a result of the SLD's mandate to comply with Section 254(h)(1)(B) of the 1996 Act, which requires that funding be distributed for educational purposes only in conjunction with bona fide requests for same. He concludes that the "SLD's policy of denying all funding requests associated with an inadequate necessary resources certification is thus based in large measure on maintaining program integrity." All for the sake of saving the SLD from the extra work that would necessarily result in having to make more than a cursory review and assessment of the many applications submitted to it every year.

Of note is the fact that the only published reference to the SLD's aforesaid purported "policy" and denial of the UTA's application and subsequent appeal is Item 15 of the minutes of the January 25/26, 1999, meeting of the SLD Committee (as published on the internet at the USAC website):

"15. Form 471, Item 22 Application Denial – The Committee was informed of an applicant whose request for services appeared to be unsupported by the necessary resources to use the discounts effectively. The Committee concurred with the Division staff analysis and requested that the Division staff discuss its concern with the FCC and take appropriate action to deny this application."

No policy reference or citation, however, is indicated. The item in the minutes does not even meet the test of an oblique reference to policy, other than an *inter alia* implementation of a presumed policy. The SLD is seemingly stuck on a pervasive road to reward schools that have large funding sources in place, and place a serious handicap before schools whose budgets are constructed from pledges, plans and the anticipation of future earnings. The necessary resources aspect of the UTA's application, based solely on an anticipated budget (albeit an anticipation steeped in fifty (50) years of fundraising experience) is certainly a difficult stumbling block for the UTA, and other private institutions like it, to overcome. Yet the SLD has set this stone at the center of its "policy" determination to deny funding to this 6,500 student institution.

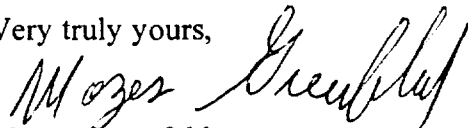
To those educational institutions whose annual budget is met through fundraising efforts and philanthropic donations, a detailed outline of all resources expected to be available in coming school year is nearly impossible, except in the most abstract of senses. Thus, in order to secure funding an applicant whose budget is based upon pledges and

donations will necessarily detail an "necessary resources certification" based on an educated guess of anticipated resources, and sometimes even a "wish list." The penalty for seeking funding through this type of application is thus proven not only severe but wholly irrelevant to the intent of the application and the program. Perhaps a two-tiered application process, where applications are returned once for revision and fine-tuning after an initial, cursory, review, would prove to be more in line with the stated Congressional intent to help all educational institutions.

As for the appeal presently before the Commission, the SLD, having admitted the propriety of the UTA's application for funding for "Basic Voice Telephone Service," should not be allowed to skirt the issue in the name of "administrative costs." Congress intended for funding to be distributed. The SLD has admitted that the UTA is entitled to this aspect of its funding request (the UTA having paid for, billed for, or partially implemented the necessary resources to support the services to be funded). It need not "step into the shoes" of the UTA in order to determine which part of the UTA's application should be accepted, as only the Basic Voice Telephone Service portion is before it for review. This is alluded to in the last paragraph of Mr. Barash's letter. This is urged by the UTA to be made "policy."

I respectfully request that the FCC give careful consideration to UTA's presentation on appeal. I am available to provide additional information or answer questions as needed, and I look forward to hearing from you soon.

Very truly yours,



Mozes Greenfeld
Telecommunications Project Director
United Talmudical Academy

cc: D. Scott Barash
Irene Flannery
Sharon Webber
Praveen Goyal
Dorothy Attwood
Jordan Goldstein
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United Talmudical Academy "Torah V'Yirah"



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בס"ד

August 11, 1999

Federal Communications Commission
Office of the Secretary
445 12th Street, SW Room TW-A325
Washington, D.C. 20544

Dear Sir/ Madame:

Enclosed please find an original and four copies of the United Talmudical Academy (UTA) appeal of a Decision of the Universal Service Administrative Company's Schools and Libraries Division (SLD), with respect to the denial of the UTA's *Application for Funding for the year 1998*.

I should add that after this appeal was prepared, the UTA received a response (copy attached) to its request for the SLD's records. This response is not adequate. Ms. Wolfhagen of the SLD in addressing question one from our July 21 communication (copy attached) replies in the narrowest sense of our request, missing, perhaps inadvertently, the intent of our request. We understand that we have not failed to follow any specific FCC rules. What we are asking is for the citation of those specific rules that create the authority serving as the bases for the denial that is given in the earlier letter sent by Ms. Kriete in February, 1999 (copy attached). Or, put another way, what is the rule structure that supports the denial of our application? This is rather straightforward.

The response to our second request provided us with SLD's procedure, but failed to give a clear reason for the denial.

The response to the third request suggests a variety of problems with our figures based upon SLD analysis, without providing the bases for the analysis. We need the figures and assumptions that guide this analysis to be able to explain our position. Otherwise we are forced to respond to finding of 5 % and 20% discrepancies without knowing how these percentages were arrived at, or if in fact such discrepancies are real.

I therefore request that the UTA be provided with the necessary information that we have requested, and that we be given the opportunity to inspect the records that are relevant to the denial of our application for funding. I also request an appropriate extension of time to frame a supplemental brief based on SLD's response to this request, once it is received.

Sincerely,

Moses Greenfeld
Moses Greenfeld

cc: Ms. Ellen Wolfhagen
Universal Service Administrative Co. Schools & Libraries Division
2120 L St. N.W. Suite 600
Washington, D.C. 20037
with one copy of appeal and exhibits via Express Mail on Aug.11,1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of:

Request for Review by
the United Talmudical Academy
of the Decision of the Universal Service Administrator

FCC Docket Nos.
97-21 and 96-45

Review of Form 471
Application No. 105791
(1998 Funding Year)
Billed Entity No. 155580

PRELIMINARY STATEMENT

The United Talmudical Academy, of Brooklyn, New York (hereinafter "UTA"), hereby appeals and seeks *de novo* review of the "Administrator's Decision on Appeal" denying Basic Voice Telephone Service funding under the UTA's Form 471 application to the Universal Service Administrative Company's Schools & Libraries Division, pursuant to 47 CFR §§ 54.719(c) and 54.723. In this appeal, the UTA limits and modifies its original request and appeal to only that portion seeking Basic Voice Telephone Service funding. All other aspects of the UTA's initial application and subsequent appeal to the Administrator are withdrawn.

The UTA is a private, non-profit, Brooklyn, New York, educational institution providing primary and secondary schooling to over 6,500 local students. It is an aggrieved party before the Federal Communications Commission as its request for appropriate funding pursuant to the Telecommunications Act of 1996 was improperly denied, as is more fully explained below.

As a preliminary matter, by letter to the Administrator, dated July 21, 1999, the UTA formally stated its intent to appeal and requested information and discovery relating to the Administrator's improper determination (copy annexed hereto as Exhibit A). To date the Administrator has failed to respond to this request and has prejudiced the UTA's ability to present a proper Request for Review. *It is therefore respectfully requested that the UTA's time to file this*

*Request for Review be extended until a reasonable time after the UTA's request for discovery is complied with.*¹

In consideration of the looming appeal deadline, the following Request for Review is submitted with a reservation of rights to file a supplemental Request for Review once UTA's discovery request is complied with.

STATEMENT OF FACTS

By application dated April 7, 1998, submitted on FCC Form 471 ("Services Ordered and Certification Form") to the Schools and Libraries Corporation/Division ("SLD"), a division of the Universal Service Administrative Company, certified by the UTA's Administrator, Rabbi Leib Glanz, the United Talmudical Academy requested various funding pursuant to the 1996 Telecommunications Act for the 1998 funding year. A copy of the Form 471 application is annexed hereto as Exhibit B.

In response the SLD requested additional information regarding the UTA's Item 22 certification on the Form 471 application (relating to the UTA's ability to secure access to all resources and make effective use of the services purchased under the program). Although no FCC Rule or Regulation was referenced for this seemingly unauthorized expansion of the UTA's Form 471 application, *the UTA complied* with the SLD's request and supplied the requested information on the SLD's "Item 22 Worksheet," together with a financial statement of the UTA showing its ability to properly secure the needed resources and services, as well as a Board Resolution

¹ The Court of Appeals for the District of Columbia Circuit, in *MCI v. FCC, et al.*, 515 F.2d 385, 392 (1974), specifically addressed this issue at length and found that "in order to prepare accurate and well formed petitions for review, we repeat, litigants must have recourse to complete statements of the decisions and orders which they undertake to challenge."

authorizing the appropriate expenditures. A copy of the UTA's reply is annexed hereto as Exhibit C.

By letter dated January 13, 1999 (copy annexed hereto as Exhibit D), the SLD's Selective Review Manager demanded "additional information" and set out five questions to be responded to. The UTA immediately complied and responded with detailed answers to the five questions (copy of answers annexed hereto as Exhibit E).

By letter dated February 26, 1999 (copy annexed hereto as Exhibit F), the SLD denied the UTA's entire Form 471 application based solely on its "finding that you have not secured access to all resources, including computers, training, software, maintenance, and electrical connections necessary to make effective use of the services purchased as well as pay the discounted charges for eligible services." Interestingly, the denial tracks the language of the aforementioned Item 22 certification, with nothing further. No explanation is given for the SLD's right or ability to question the certification, nor for its apparent disregard for the UTA's financial statements and the resources attested to therein.

By "Letter of Appeal," with attachments, dated March 24, 1999 (copy annexed hereto as Exhibit G), the UTA requested review of the SLD's determination pursuant to the suggested procedure of Appeal to the Administrator prior to the instant appeal to the FCC. In its Letter of Appeal the UTA recognized the SLD's unwillingness to accept the UTA's representations of its financial resources and administrative abilities. It therefore modified and limited its original FCC Form 471 application for funding to those services and resources already paid for, billed for, or partially implemented. Its actions thereby negated any question the SLD could possibly or properly have *vis a vis* the UTA's ability to "secure access to all resources." Having secured the requisite access, paid the "discounted charges for eligible services" and implemented the requisite

in-house programming, the UTA removed any and all doubts the SLD raised in its very narrow but clear denial of its Form 471 application.

Nonetheless, by "Administrator's Decision on Appeal" dated July 14, 1999 (copy annexed hereto as Exhibit H), the SLD denied the UTA's appeal citing its inability to allow the modification of the Form 471 application and approve of it in part rather than as a whole. While apparently accepting the UTA's basis and foundation for appeal (thus determining that under a different set of circumstances the appeal would be granted), the SLD advised of a "concept" that the "application as a whole must pass scrutiny, without regard to whether resources can be allocated differently to cover a portion of the expenses."

The UTA now seeks *de novo* review of the Administrators actions. The UTA's request is simplified in that it now limits its appeal to only the Basic Voice Telephone Service funding aspect of its original application (Exhibit B) and Letter of Appeal (Exhibit G, Item 1).

ARGUMENT

The UTA seeks a reversal of the underlying Administrator's determinations denying funding under the Telecommunications Act of 1996. The UTA respectfully submits, on this appeal, a modified application seeking funding only for that portion of the application regarding the Basic Voice Telephone Service, and requests that the modified application be granted on its own, admitted, merit. The UTA further submits that (a) the SLD should have granted the UTA's modified request on the initial SLD appeal, that (b) once it certified Item 22 on the original Form 471 application (regarding ability to secure appropriate resources) the SLD had no authority to question that certification, that (c) the UTA's response to the SLD's Item 22 clarification request

was nevertheless complete and proper, and that (d) the UTA was denied basic due process by the SLD.

The UTA, in this appeal, only seeks funding for the Basic Voice Telephone Service part of its original application. Although its original application, it is contended, was proper as a whole, it is the Basic Voice Telephone Service denial that is most ripe for review. The UTA on its original Form 471 application submitted requests for various funding under the Telecommunications Act. It submitted its request on one application. The Administrator has apparently decided that if only one application is submitted, any portion of the application that can be rejected serves to nullify the entire application. This is patently unfair. If part of the application is valid and deserving of award, as is implied by the Administrator (Exhibit H), it should not be denied because of its association to allegedly invalid portions of the applications. All the more so on the appeal wherein only those parts that were definitively valid were presented for review. The Administrator need not have reviewed the entire application, having been presented with a limited and modified application on appeal such as it was. That is the purpose of a *de novo* review.

Of importance, therefore, is the fact that the SLD has allowed applicants to file multiple Form 471 applications, thereby providing for the addressing of a many faceted request for funding in a bifurcated or compartmentalized manner. In other words, an institution seeking Basic Telephone Voice Service *and* Internal Connections can make **two** applications: should one fail the other remains valid. This was done in an apparent attempt to recognize the propriety of the allocation of resources to different parts of the funding program without limiting an institution's ability to obtain funding for one service over another. The "concept" (Exhibit H), therefore, of an application requirement to pass muster as a whole and not in part, is negated by the

Administrators own Rules allowing for the submission of several "part" applications.

The Administrators decision which rejects out of hand the entire UTA application because of the invalidity of a part of it, is therefore "conceptually" abhorrent to its own process and procedure allowing for the submission of part applications on many forms instead of whole applications on one form. This is underscored by the Administrator's reliance on a "concept" (Exhibit H) rather than a Rule or Regulation. The UTA has recognized that certain portions of its application should be revised and separated for the application process of the next funding year so as to better comply with the purposes of the Telecommunications Act of 1996, and it is committed to doing so. It should not be punished for this however, and it should not be denied funding that has been granted by Congress for appropriate portions of its applications simply by reason of not submitting several applications instead of one.

It should be emphasized that, to date, the Administrator has not made clear exactly why the balance of UTA's application (not presented for review) has been denied. Clearly the Administrator's perfunctory denial of the entire application as violative of the "rules," without reference to which rules, and as an application that fails to provide for the appropriate resources, without explanation as to why and without regard to those portions that clearly do meet the 'resources' criteria, is a slap in the face of the most basic constitutional protections for governmental entitlements and due process of law. Neither the SLD nor the FCC provided notice of and an opportunity to comply with its orders regarding the preparation of the Form 471 applications. The general public was put to the test to submit applications blindly. Yet the applications were held to the strictest of standards. Any portion of an application that was improper apparently invalidated the entire request - according to the "rules."

Nor was the SLD's review process beneficial even as to a simple explanation of the

purported 'rules' that precluded funding to the UTA on its Form 471 application. The Administrator's decision on appeal limited its determination to two sentences (Exhibit H):

"The necessary resources standard is one that is applied against the entire application, not to individual Funding Request Numbers (FRNs). This policy is based on the concept that the application as a whole must pass scrutiny, without regard to whether resources can be allocated differently to cover a portion of the expenses."

The determination admits the propriety of a portion of the application presented for appeal and summarily dismisses its validity as an application that is associated with improper requests. Almost like 'guilt by association,' to turn a common phrase. Certainly it is not in confluence with basic due process.

Ultimately, it is for this appeal before the FCC to determine the propriety and cogency of the UTA's request for funding. The request is limited and the SLD has indicated that the portion presented on appeal would have been funded 'but for.' Under those few rules posted for the public to review it is clear that this appeal is one for a *de novo* review. Such a review is complete and can encompass all aspects of the initial application and decision. In other words, a modification of the initial application when presented in this forum is proper and should be allowed to stand on its own merits. When combined with the actual expenditures of the UTA in this modified request the initial denial based on an inability to secure resources becomes moot and the application is left standing with no reason why it should not be granted. It could be said that this forum need not even review the UTA's response to the item 22 worksheet as it has no relevance in the face of the resources already secured. The item 22 worksheet, after all, is geared towards verifying the future *ability* to secure resources, and the UTA has proven it already has this ability.

CONCLUSION

Based upon all the foregoing, it is respectfully requested that prior to the making of a final determination by the FCC the UTA be given an opportunity to review all the records of the SLD as they specifically pertain to the UTA's application so as to allow the UTA to submit a more informed and properly prepared supplemental memorandum on appeal to the FCC.

It is further requested that the UTA's request for Basic Voice Telephone Service funding be reviewed, *de novo*, and upon such review be granted in its entirety as a modified Form 471 application for funding.

The undersigned hereby verifies that I have read the foregoing, and that to the best of my knowledge, information and belief there is good ground to support it, and it is not interposed for delay.

Dated: August 10, 1999
Brooklyn, New York

Respectfully submitted,

Mozes Greenfeld
Telecommunications Project Director
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